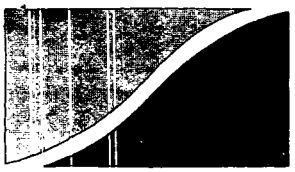

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SENT VIA DHL EXPRESS

February 12, 2007

Sarah Flanagan, Esq.
United States Environmental Protection Agency
Assistant Regional Counsel
Office of Regional Counsel
290 Broadway – 17th Floor
New York, New York 10007

Re: Diamond Alkali Superfund Site; Notice of Potential Liability for Response Actions in the Lower Passaic River Study Area, New Jersey

Dear Ms. Flanagan:

We write on behalf of Seton Company ("Seton") with respect to the Demand Notice Letter ("Notice Letter") received by Seton on February 5, 2007 from the United State Environmental Protection Agency ("EPA" or "the Agency") regarding the Diamond Alkali Superfund Site, notifying Seton of Potential Liability for Responses Action in the Lower Passaic River Study Area, New Jersey ("LPRSA").

Through this letter, Seton is responding to EPA's request that Seton participate in the Cooperating Parties Group ("CPG") formed to fund the CERCLA study portion of the LPRSA (including the payment of substantial past costs incurred by the CPG for activities in which Seton had no involvement).[1] While Seton appreciates the importance of cooperating fully with EPA, and intends to continue to do so, as discussed in detail below, EPA has not presented evidence to support its assertion that Seton's former Newark, New Jersey operations produced hazardous substances that were then released in the Passaic River and which, in turn, are triggering CERCLA response costs.

Given the weakness of the evidence advanced by EPA, it is critical that any participation in a PRP group, and financial commitment, must include a corresponding opportunity to have these legal and factual issues addressed in a meaningful, robust and timely manner. As it is not at all apparent that the CPG assures such an opportunity, Seton is not prepared to accept EPA's invitation that it joins the CPG at this time. Under these circumstances, it also is inappropriate for the Agency to assert that Seton should pay substantial past costs incurred by the CPG, much less to threaten potential liability and enforcement proceedings against Seton.

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[1] This represents a substantial commitment; Seton has been informed that the CPG has already committed to fund $10 million in study costs (with additional $9MM to be contributed by the United States), and is currently negotiating to assume responsibility for additional study activities estimated to cost in excess of an additional $50 million.

Seton proposes a meeting with appropriate EPA officials to discuss the points raised in this letter, and to further explain the basis for Seton's position in this matter. Seton representatives also are open to meeting with members of the CPG toward the same end. We offer to discuss these issues further because Seton has significant experience in remediation issues and approaches these issues in a sophisticated and responsible way. In this case, however, the evidence presented fails to meet the minimum threshold of evidentiary standards that might justify Seton's involvement in this matter under the terms offered by EPA and the CPG.

I. EPA's NEXUS PACKAGE DOES NOT ESTABLISH THAT HAZARDOUS SUBSTANCES FROM SETON'S OPERATIONS WERE RELEASED TO THE PASSAIC RIVER AND WHICH, IN TURN, ARE TRIGGERING CERCLA RESPONSE COSTS; INFACT, THE NEXUS PACKAGE RAISES A NUMBER OF SERIOUS QUESTIONS ABOUT THE ALLEGED CONNECTION BETWEEN SETON'S FORMER OPERATIONS AND THE PASSAIC RIVER.

The information provided to Seton by EPA and the CPG purports to present an "indirect discharge PRP case" concerning releases to the Passaic River from Seton's former Newark, New Jersey operations. In fact, however, the "nexus" package fails to establish or document a nexus between Seton's former operations and the expenditure of response costs at the LPRSA site. Rather than tie Seton to the Passaic River, it includes information which supports the proposition that Seton's former operations, for a number of site-specific and operation-specific reasons, did not likely release hazardous substances into the Passaic River and that, even if any such releases occurred, they were insufficient in type or quantity to trigger the response costs at issue in this matter.

A. There is no nexus between Seton's former Newark, New Jersey operations and the release of any hazardous substances to the Passaic River and which, in turn, are triggering CERCLA response costs.

In operation from approximately 1906 to 2006, Seton's former operations occupied ten (10) acres, well inland (approximately 1000 feet) from the Passaic River. The only alleged connection between Seton's former operations and the Passaic River are possibly some inadvertent discharges by the combined sewer outlet ("CSO") due to sewer overflows or otherwise heavy rain conditions. Such instances certainly due not qualify as direct discharge since the sewers contained waste waters from the entire region. Moreover, the New Jersey Department of Environmental Protection's claims of direct discharge by Seton to the Passaic River on December 11, 1990 are incorrect. Specifically, an investigation on December 11, 1990 by the New Jersey State Police, the U.S. Coast Guard and the PVSC exonerated Seton as the discharger and identified a neighboring company as the true and actual source of direct discharge to the Passaic River.

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II. EPA CANNOT SHOW THAT EVEN IF, CONTRARY TO THE EVIDENCE, THE HAZARDOUS SUBSTANCES WHICH IT ASCRIBES TO SETON'S FORMER OPERATIONS HAD REACHED THE PASSAIC RIVER, SUCH RELEASES "CAUSE[D] THE INCURRENCE OF [CERCLA] RESPONSE COSTS."

There is no direct evidence that the hazardous constituents identified in wastewater reports for Seton's former operations actually entered the Passaic River – and many reasons to expect they did not. As discussed above, EPA's nexus package provides, at best, an inference that Seton's wastewater did enter a combined sewer where it immediately mixed with other flows within the system, including urban storm water and sanitary flows, and that these combined flows may have in turn reached the river on infrequent occasions when significant rain coincided with low tides via the CSO.

Furthermore, the constituents in question are not the types of constituents that are driving either the risk, or the remedy, for the Passaic River. Dioxin, PCBs, DDT, and mercury are the historical and the current drivers for the OU II (the Lower Passaic River). *See* EPA Region 2 National Priority List Fact Sheet for Diamond Alkali Co., New Jersey, *available at* http://www.epa.gov/region02/superfund/npl/0200613c.pdf (noting that, "[t]he Lower Passaic River and Newark Bay are under fish and shellfish consumption advisories, issued by NJDEP based on polychlorinated biphenyl (PCB), dioxin and/or chlordane contamination"). In particular, dioxin is the primary driver fro investigation and remediation of the Passaic River. It was upon the confirmation that PCBs, DDT, dioxin, and chlordane had contaminated the River, that the New Jersey Department of Environmental Protection ("NJDEP") put advisories and bans in place for fish and shellfish from the Passaic.[2] Current advisories remain based on PCBs, dioxin, and mercury. *See* NJDEP's "2006 Fish Smart, Eat Smart – A guide to Health Advisories for Eating Fish and Crabs Caught in New Jersey Water at 8."[3]

There is no evidence that Seton's former operations generated *any* of these constituents of special concern. Instead, the [*WES reports reference copper, nickel, arsenic, and cyanide*] – constituents commonly found in sanitary sewage and urban runoff, and for which there are no fish advisories in place. In contrast to PCBs, DDT or dioxin, the Passaic River is not impaired for copper, nickel or cyanide. Likewise, Total Maximum Daily Loads ("TMDLs") are not in place for these compounds, or for arsenic.[4] A 2005 study of the lower six-mile stretch of the Passaic River found that sediment concentrations of copper and nickel are not sufficiently high to warrant concern about the aquatic toxicity; both are unlikely to be bioavailable in this area. *See* T.A. Armstrong, T.J. Iannuzzi, J.B. Thelen, and D.F. Ludwig, *Characterization of Chemical*

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2 *See NJDEP's " Polychlorinated Biphenyls (PCBs), Chlordane, and DDTs In Selected Fish and Shellfish From New Jersey Waters, 1986-1987: Results from New Jersey's Toxics in Biota Monitoring Program"* (1990) at 40-44 (citing N.J.A.C. 7:25-18A, which notes that advisories were put in place in 1982 for the Tidal

3 This document by the New Jersey Department of Environmental Protection and New Jersey Department of Health and Senior Services is available at http://www.state.nj.us/dep/dsr/2006fishadvisorybrochure.pdf.

4 *See* New Jersey 2004 Integrated Water Quality Monitoring And Assessment Report (305(b) and 303(d)) (2004) [hereinafter 2004 NJ 305(b) and 303(d) Report], *available at* http://www.state.nj.us/dep/wmm/sgwqt/wat/integratedlist2004.html (placing copper and nickel on Sublist 1, attain the water quality standard/no threatened use; not placing cyanide on any water quality impairment list; indicating arsenic is on Sublist 5 and water quality impaired, but not instituting a TMDL).

Contamination in Shallow-Water Estuarine Habitats of an Industrialized River, 14 Soil & Sediment Contamination 35, 48 (2005). The only metals present in LPRSA sediments at average concentrations sufficiently high to warrant concerns about aquatic toxicity are ones not detected in the [*RCA WES sampling – lead, mercury and zinc*]. *See id.*

In short, the constituents associated with Seton's former operations are of limited interest with regard to the Passaic River. They are not driving the remedy, and never will. Indeed, cleanup standards that might someday be applied for these materials (i.e., the likely Applicable or Relevant and Appropriate Requirements ("ARARs")), already are being satisfied.

III. EPA'S DEMAND THAT SETON JOIN THE CPG, CONTRIBUTE TO PAST COSTS THAT THE GROUP INCURRED WITHOUT ANY INPUT FROM SETON, AND MAKE AN OPEN-ENDED FUNDING COMMITMENT TO AN RI/FS FOR THE PASSAIC RIVER IS NOT APPROPRIATE, GIVEN SETON'S UNIQUE CIRCUMSTANCES.

EPA's Notice Letter presents Seton with a single option: join the CPG. The terms proposed for joining the CPG require a large outlay of funds for past CPG expenditures for which Seton had no say, combined with an open-ended financial commitment for future costs without any near-term prospect of allocating costs based on a robust process that applies appropriate due process and evidentiary standards. This is not an acceptable option for a company like Seton which has such attenuated connection to the LPRSA.

The unfairness of EPA's push for Seton to join the CPG is exacerbated by the fact that the CPG members had substantially completed an interim cost allocation based on a truncated allocation process when Seton was initially contacted by the CPG after receiving the EPA's letter. This interim allocation apparently will be used to cover millions of dollars in study costs; a more robust allocation process may not be undertaken for at least five years or more.[5] Since CPG members already have completed this process, there is no incentive for the CPG to take an objective, hard look at the facts involved in Seton's situation and acknowledge that there is an insufficient connection between Seton's former operations and the Passaic River response costs. Moreover, it is EPA – and not a PRP group – that has the obligation under CERCLA to fairly evaluate allegations of liability, and to provide an opportunity for companies that have made only minor contribution to a site to settle out of the matter without getting caught up in the high transaction costs that are attendant to a very large site with a large number of PRPs. This is particularly important given the *Aviall*-related line of cases, which can put cooperating parties at risk of later litigation in the absence of a formal settlement with EPA.

In summary, Seton has been presented with an exceptionally weak nexus package in this matter. The facts do not show that hazardous substances from Seton's former operations were discharged into the Passaic River. The tenuous theory of constituent transport that EPA apparently is propounding in this matter overlooks that specific facts associated with Seton's

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[5] When the stakes are as high as they are in this matter, an allocation process must include due process protections, including a full opportunity to: understand the potentially applicable facts regarding alleged PRPs; test those facts against appropriate evidentiary standards in a trial-type setting; and contest allegations in the presence of a neutral mediator or arbitrator.

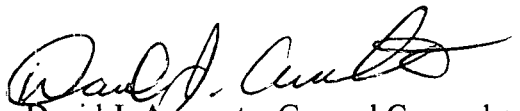
former operations, much less the loadings from municipal sanitary and urban runoff flows which would implicate thousands of additional entities.[6] When EPA is stretching this far to try to make out a case of CERCLA liability, it cannot simply push Seton and other late-identified companies to join a PRP group that does not share its interests, and which has no incentive to deal fairly with this new group of entities.

IV. CONCLUSION.

For the reasons discussed above, Seton is unwilling to commit to join the CPG at this time. However, Seton is continuing to search for relevant information, and it reserves that right to modify its position as appropriate, depending on its discovery of new information and further dialogue with the Agency or the CPG. Further, Seton would welcome the opportunity to meet with EPA and the CPG to consider any additional information the Agency may have in its possession and to discuss the concerns and options laid out in this letter, including the need to set up a fair allocation process and terms of participation that all prospective PRPs can accept. Based on the foregoing, Seton respectfully requests a time extension in this matter so it may further explore the potential discharge and contamination issues prior to committing to such significant expenditures.

Please do not hesitate to contact me directly at (610) 666-9600 Ext. 144 if you have any questions.

Sincerely,



David J. Acquesta, General Counsel and Assistant Secretary

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6 One 1992 study, for example, estimated that "the actual number of industrial discharges [to PVSC] is approximately 5,000." N.M. Shear, C.W. Schmidt, S.L. Huntley, D.W. Crawford and B.L. Findley, *Evaluation of the Factors Relating Combined Sewer Overflows with Sediment Contamination of the Lower Passaic River*, 32 Marine Pollution Bulletin 238, 1996. If EPA is sending General Notice letters to parties based on nexus packages like that for Seton, which indicates only [*a single short-lived hazardous substance was present in its discharge at measurable quantities*], then virtually every industrial discharger ever located in the Passaic watershed should also receive a General Notice Letter; as Seton has already observed, however, there is very little incentive for parties with such an attenuated nexus to the River to join the CRP under the terms offered.